JAN 24 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 682.

MARY BRYAN GORHAM,
PETITIONER,
v.
MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION OF OMAHA,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND APPENDIX.

JULIUS C. SMITH,
Counsel for Respondent,
C. R. WHARTON,
Counsel for Respondent,
Greensboro, N. C.
KEMP D. BATTLE,
Counsel for Respondent,
FRANCIS E. WINSLOW,
Counsel for Respondent,
Rocky Mount, N. C.

SUBJECT INDEX

	Page
CAPTION	
I. Opinion of the Court Below	1
II. Statement of the Case	1
III. Grounds for Denying Review	2
Firstly, No question of public importance under Rule 38 presented on this petition	2
A. Circuit Court of Appeals has not decided an important question of local law in a way probably in conflict with local decisions	2
THE LAW	2–10
This point was conceded by petitioner below	2
Therefore Supreme Court will not consider it	3
State law in accord:	
As to evidence required	4
As to burden of proof	4
As to effect of presumption	4, 10
THE FACTS	10, 17
B. Circuit Court of Appeals has not decided an important question of law in conflict with other circuits	17
C. Decision below not in conflict with decisions of Supreme Court of United States	18
D. Neither court below departed from accepted or usual course of judicial proceedings	18
Secondly, The granting of the review or even remand to the court below would not avail petitioner in the vindication of her private rights	19, 23
A. The action was not seasonably brought	19, 21
B. Petitioner failed to give notice or file proofs	21, 22
C. Petitioner violated the autopsy clause	22, 23
IV. CONCLUSION	23

Page

Appendix I (Respondent's brief below, for reference only) follows page ---------- 24

CITATIONS

Statutes:

Consolidated Statutes of North Carolina
No. 415, Appendix I, p. 5 ---------- 19
No. 6290, Appendix I, p. 5 ---------- 19, 20
No. 407, Appendix I, p. 6 ---------- 19

Court Decisions:

Beard vs. *Sovereign Lodge*, 184 N. C. 154 ---------- 19, 20
Burkett vs. *N. Y. Life Ins. Co.*, 56 F. 2d, 105 ---------- 16
Capital Traction Co. vs. *Hof*, 174 U. S.1 ---------- 10
Carolina Transportation & Distributing Co. vs. *Ins. Co.*, 214 N. C. 596 ---------- 20
Carter vs. *Ins. Co.*, 208 N. C. 665 ---------- 22
Clay vs. *Ins. Co.*, 174 N. C. 642 ---------- 5
Cobb vs. *Fogleman*, 23 N. C. 440 ---------- 4
Del Vecchio vs. *Bowers*, 296 U. S. 280 ---------- 2, 4, 6, 15, 18
Dunn vs. *Swanson*, 217 N. C. 279 ---------- 6, 20
Eckard vs. *Ins. Co.*, 210 N. C. 130 ---------- 19
Erie Railroad vs. *Tompkins*, 304 U. S. 61 ---------- 2
Frankel vs. *N. Y. Life Ins. Co.*, 51 F. 2d, 933 ---------- 15
Gorham vs. *Ins. Co.*, 214 N. C. 526, 215 N. C. 195 ---------- 8, 21
Hare v. Weill, 213 N. C. 484 ---------- 22
Harris vs. *Ins. Co.*, 204 N. C. 385 ---------- 4
Harrison vs. *R. R.*, 194 N. C. 656 ---------- 22
Heilig vs. *Ins. Co.*, 152 N. C. 358 ---------- 19, 20
Helvering vs. *Minnesota Tea Co.*, 296 U. S. 378 ---------- 3
Hill vs. *Ins. Co.*, 207 N. C. 166 ---------- 22
Holly vs. *London Assur. Soc.*, 170 N. C. 4 ---------- 19, 20
Home Life Ins. Co. vs. *Moon*, 110 F. 2d, 184 ---------- 3
Hooker vs. *Worthington*, 134 N. C. 283 ---------- 6
Jefferson Standard Life Ins. Co. vs. *Clemmer*, 79 Fed. 2d, 724 ---------- 2, 4, 5
King vs. *Ins. Co.*, 197 N. C. 566 ---------- 4
Lea vs. *Assurance Soc.*, 211 N. C. 182 ---------- 22
Lewis vs. *Steamship Co.*, 132 N. C. 904 ---------- 4
Love vs. *N. Y. Life Ins. Co.*, 64 F. 2d, 829 ---------- 16
Mangol vs. *Metropolitan Life Ins. Co.*, 103 F. 2d, 14 ---------- 20
Mehaffy vs. *Ins. Co.*, 205 N. C. 701 ---------- 4

	Page
Modlin vs. *Ins. Co.*, 151 N. C. 35	19
Muse vs. *Ins. Co.*, 108 N. C. 240	20
McCulloch vs. *Mutual Life Ins. Co.*, 109 F. 2d, 866	23
McGill vs. *Lumberton*, 215 N. C. 752, 218 N. C. 586	6, 7
McIntosh, N. C. Practice & Procedure, p. 632	6, 18
New York Life Ins. Co. vs. *Gamer*, 106 Fed. 2d, 375	6, 7, 20
New York Life Ins. Co. vs. *Gamer*, 303 U. S. 161	2, 8, 18
New York Life Ins. Co. vs. *Stone*, 80 Fed. 2d, 614	2, 15
Ocean Accident & Guaranty Co. vs. *Moore*, 85 F. 2d, 367	22
Parker vs. *Ins. Co.*, 143 N. C. 339	20
Rouse vs. *Old Colony Ins. Co.*, 203 N. C. 345	19
Ruhlin vs. *New York Life Ins. Co.*, 304 U. S. 202	18
Scott vs. *Ins. Co.*, 208 N. C. 160	4
Six Companies vs. *Joint Highway, District*, — U. S. —, 85 L. ed. 159 (Adv. op.)	21
Spruill vs. *Ins. Co.*, 120 N. C. 141	5, 17
State vs. Satterfield, 121 N. C. 558	4
Stoner vs. *New York Life Ins. Co.*, —U. S. —, 85 L. ed. 275 (Adv. op.)	22
Thigpen vs. *Ins. Co.*, 204 N. C. 551	22
U. S. vs. *Thornburg*, 111 Fed. 2d, 278	13, 22
Warren vs. *Ins. Co.*, 212 N. C. 354, 215 N. C. 402, 217 N. C. 705	4, 5, 17, 19
Webster vs. *Fall*, 266 U. S. 507	6, 20
Welch vs. *Ins. Co.*, 192 N. C. 809	19
West vs. *Am. Tel. & Tel. Co.*, — U. S. —, 85 L. ed. 146, 152 (Adv. op.)	19
Wharton vs. *Ins. Co.*, 178 N. C. 135	6
Wittowsky vs. *Wasson*, 71 N. C. 451	4

Supreme Court of the United States

OCTOBER TERM, 1940

No. 682.

MARY BRYAN GORHAM,
PETITIONER,
v.
MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION OF OMAHA,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT,
AND
APPENDIX.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals, for the Fourth Circuit, dated Aug. 22, 1940, is reported in 114 Fed. 2d, p. 97.

II.

STATEMENT OF THE CASE.

A full statement of the case is contained in the brief of Mutual Benefit Health and Accident Association, appellee, in the United States Circuit Court of Appeals, Fourth Circuit, which is included in this brief as Appendix I. For the sake of brevity, the statement is not repeated herein. To avoid repetition, reference will be made to the appropriate pages of Appendix I.

III.

GROUNDS FOR DENYING REVIEW.

No question of public importance in judicial administration is presented on this record; and a review would be of no avail to petitioner with respect to her private rights.

Firstly, the single question presented by the petition is of no importance to the public interest in judicial administration, within the meaning of Rule 38.

A. THE CIRCUIT COURT HAS NOT DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

THE LAW.

Petitioner, doubtless observing that the Supreme Court grants certiorari when it appears that a Circuit Court of Appeals has decided a case under "general law," instead of the applicable State law (*Erie R. R.* vs. *Tompkins,* 304 U. S. 64), has sought diligently to bring this case under that principle. But the decision of the court below is in accordance with the law of North Carolina, both by her own agreement with the court below, and by the decisions of the Supreme Court of North Carolina. Respondent respectfully submits that this situation eliminates the *Erie case,* and the principle it decides, from this case, on the single point made in the petition.

On page 10 of her brief in the Circuit Court she stated that she "might" argue that in North Carolina the common law presumption against suicide has the quality of evidence, which would carry any case of death by violence to the jury, but "we prefer, however, to meet our adversaries on their own ground and, for the sake of the argument, proceed upon the theory that the true rule is as laid down in *Clemmer,*[1] the *Gamer,*[2] the *Stone*[3], and the *Del Vecchio*[4] *cases,* i. e., that upon the introduction of evidence of suicide the presumption goes out of the case and that such 'presumption against suicide is

[1] *Jefferson Standard Life Ins. Co.* vs. *Clemmer* (C. C. A. 4th), 79 Fed. 2d, 724.
[2] *New York Life Ins. Co.* vs. *Gamer,* 303 U. S. 161.
[3] *New York Life Ins. Co.* vs. *Stone,* 80 Fed. 2d. 614.
[4] *Del Vecchio* vs. *Bowers,* 296 U. S. 280.

not evidence; when the case goes to the jury they are at liberty to take into consideration the abnormality of suicide but if the evidence leaves their minds in such doubt that they are unable to decide whether death by accident has occurred, their verdict should be for defendant and it is not necessary for the jury to be satisfied that all other reasonable hypotheses of death have been excluded.' With this as our guide let us proceed to a consideration of the rule universally approved in such cases."

Thus all of counsel and court agreed on what the law of North Carolina is on this question as to the function of the common law presumption against suicide, and the first ground of decision (top p. 4 of opinion, R. 222) was "the views we entertain with respect to the nature of the presumption against suicide and the burden of proof in such cases," citing the *Clemmer case* and *Home Life Ins. Co.* vs. *Moon* (C. C. A. 4th), 110 Fed. 2d, 184. If petitioner disagreed, the time to disagree was before or on the argument. Instead, she invited the Circuit Court of Appeals to hold as it did. Now, the first ground relied upon in her petition, pp. 13–14, is that the court put the burden of proof upon her, and refused to accord to the presumption sufficient force, all by itself, despite evidence of suicide, to carry the case to the jury, citing North Carolina cases which do not support the thesis, and calling upon the *Erie case* to show error. True, the assignment of error suggests "other facts" which tend to support the homicide theory, but it will be shown that there are no such facts, and that the common law presumption is the real and only reliance of petitioner.

The Supreme Court will not consider a point first raised by the petition for certiorari. *Helvering* vs. *Minnesota Tea Co.*, 296 U. S. 378.[1]

[1] When the respondent was asked to stipulate the record on the petition on November 19, 1940, the petition had not been written, and respondent did not know until it was served that this point would be raised. It had never been raised before. Thereupon, respondent requested petitioner to stipulate that page 10 of her brief below be added to the record. as part of the "Proceedings in the Circuit Court of Appeals" (R. 1). Petitioner declined to so stipulate, but her counsel wrote on January 18, 1941, to respondent's counsel: "You have our consent to quote in your own brief either the whole or any part of page 10 of the brief filed by us in the Circuit Court of Appeals * * * There is no necessity for either the stipulation or the procedure referred to in your letter of the 16th." This would seem to bring the matter before the Court without additional expense for printing the record.

Furthermore, petitioner was well advised to concede the State law as contended for by respondent. The decisions of the North Carolina Supreme Court sustain that view. Petitioner, with the burden of showing error, has cited no case from North Carolina establishing the contrary view, as to the amount of evidence required to make a prima facie case, as to the burden of proof, or as to the function of the presumption against suicide, and its effect upon taking the case from the jury.

In the Federal Courts "substantial evidence" is required. But that means nothing more than that "a finding must be supported by evidence." *Del Vecchio* vs. *Bowers,* 296 U. S. 280, 286. In North Carolina "there must be evidence from which they (the jury) might reasonably and properly conclude that there was negligence." *Wittkowsky* vs. *Wasson,* 71 N. C. 451. "It cannot be doubted that what raises a possibility or conjecture of a fact never can amount to evidence of it." *Cobb* vs. *Fogleman,* 23 N. C. 440. "It is a preliminary question for the court who must find, not that there is absolutely no evidence, but that the evidence is such as would justify a jury in proceeding to a verdict, such as will reasonably satisfy an impartial mind." *State* vs. *Satterfield,* 121 N. C. 558. See comprehensive opinion of H. G. Connor, J., who later distinguished the U. S. District Court bench, in *Lewis* vs. *Steamship Co.,* 132 N. C. 904. And in *Warren* vs. *Ins. Co.,* 217 N. C. 705, 709–10, the court reaffirmed the ban upon "pure surmise and speculation," and held that the evidence must show "other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to *actual proof.*" There is apparent no substantial difference in definition between the State rule and the Federal rule.

The burden of proof is upon the beneficiary in an action upon an accident policy, to prove death by accidental means, in North Carolina as elsewhere. *King v. Ins. Co.,* 197 N. C. 566, 568; *Harris* vs. *Ins. Co.,* 204 N. C. 385; *Mehaffey* vs. *Ins. Co.,* 205 N. C. 701; *Scott* vs. *Ins. Co.,* 208 N. C. 160; *Jefferson Standard Life Ins. Co.* vs. *Clemmer,* 79 Fed. 2d, 724, 731; 103 A. L. R. 171, note 179.

The function of the common law presumption of accidental death, when unexplained death by violence is shown, and its effect upon taking the case from the jury, is the same in North Carolina as elsewhere. There is no philosophical discussion

of the subject in North Carolina, such as that found in the *Clemmer, Gamer,* and other cases, but the decisions have been in accord. In *Spruill* vs. *Ins. Co.,* 120 N. C. 141, there was a directed verdict finding suicide. And in *Warren* vs. *Ins. Co.,* 217 N. C. 705, there was a "peremptory instruction" to find that the death was not by accidental means, but by the intentional act of another person (homicide). This is an interesting case which went to the North Carolina Supreme Court three times. The accident clause in the policy contained an exception from coverage in event of death from bodily injury intentionally inflicted by another. On the first appeal (212 N. C. 354) the court held that the burden was on the defendant to bring the case within the exception from accident coverage. (Unprovoked homicide is an accident in North Carolina, *Clay* vs. *Ins. Co.,* 174 N. C. 642.) On the second appeal (215 N. C. 402) the court intimated a doubt as to the correctness of its former ruling, citing and digesting the *Gamer* and *Clemmer cases* as stating the correct rule "that the burden of the issue of death by accidental means still remains upon the plaintiff" (404) despite the presumption, but held that "*considering the pleadings* in this case, we are not disposed to hold for error the instructions given by the court below" that the burden in *this case* was upon defendant (p. 404). The court cited with approval the leading case in the southeast on this subject, *Jefferson Standard Life Ins. Co.* vs. *Clemmer,* 79 Fed. 2d, 724. On the last appeal, 217 N. C. 705 (June 8, 1940), the court held for error the refusal of the court below to instruct the jury peremptorily that if they found the facts to be as the *defendant's evidence* tended to prove, they must find death by intentional homicide. It was "the law of the case" that the burden was on defendant, to prove an affirmative defense. In that situation the instruction was "peremptory" for this defendant. "If all the evidence offered by the defendant—the plaintiff having offered none (except the fact of violent death)—tends to explain the death by violence and to show that the death resulted from a wound intentionally inflicted by another, *then as a matter of law* the defendant was entitled to have the court instruct the jury in accord with its prayer . . . If the facts are admitted or established and *only one inference can* be drawn from them, *the judge may draw the inference and so direct the jury*" (pp. 707–8). If the burden had been upon plaintiff in that case, the action would have been nonsuited,

or verdict directed for defendant. *Hooker* vs. *Worthington,* 134 N. C. 283, 285. In North Carolina a directed verdict for a defendant and a nonsuit are practically equivalent. *McIntosh,* N. C. Practice and Procedure, p. 632.

In the *Warren case* appears the most complete statement of the North Carolina court's views upon the function of the presumption. Judge Devin's statement on the second appeal has already been referred to (215 N. C. 402, 404)—Judge Barnhill's statement on the last appeal (217 N. C. 705–6)—is as follows:

"Thus the rule arises that when an unexplained death by violence is shown, nothing else appearing, it is presumed that the death resulted from accidental means. When, however, there is evidence tending to explain the cause of death, it becomes a question of fact for the determination of the jury." The court then decides that assuming the uncontradicted evidence of *defendant* be true, the burden being on defendant in that case, then as a matter of law the death was not by accidental means, and the jury should have been peremptorily instructed. If the burden had been on plaintiff the verdict would have been directed for defendant, or case nonsuited. The court took the case from the jury. The *Warren case,* on its second appeal, is relied upon by petitioner. The *Warren case* in its entirety, especially on the last appeal, is definitely in support of respondent's position.

There is cited, and there exists, no North Carolina case supporting petitioner's contention. Only three others are cited.

In *Wharton* vs. *Ins. Co.,* 178 N. C. 135, the distinction between life policies and accident policies as affecting burden of proof, was not raised or discussed either by court or counsel. The question merely lurked in the record, and the case is not a precedent. *Dunn* vs. *Swanson,* 217 N. C. 279; *N. Y. Life Ins. Co.* vs. *Gamer,* 106 Fed. 2d, 375; *Webster* vs. *Fall,* 266 U. S. 507, 511. In the *Warren case* it was not even cited.

McGill vs. *Lumberton,* 215 N. C. 752, 218 N. C. 586, is not in point on this question at all. This is seen when the case is considered in connection with *Del Vecchio* vs. *Bowers,* 296 U. S. 280.

Both these cases arose under Workmen's Compensation Acts. Both of them were tried upon the theory that the deceased died from a self-inflicted wound (pistol shot), and the

cases turned upon the question of accident or suicide. In both of them, the frontal position of the wound was consistent with either accident or suicide. In both of them claimants relied upon unexplained death by violence, which raised a statutory presumption of accidental death.

In the *Bowers case* the statutory presumption arose only "in the absence of substantial evidence to the contrary," but the burden of proof remained on the claimant. There was evidence of suicidal motive, that deceased was facing a second mastoid operation. The Deputy Commissioner under the Harbor Workers' Compensation Act found suicide; the U. S. Court of Appeals for the District of Columbia reversed, holding that the statutory presumption had the quality of affirmative evidence, not overcome by "substantial" evidence, i. e., sufficient "to induce conviction." The U. S. Supreme Court reversed the Court of Appeals and upheld the Deputy Commissioner, on the ground that the presumption does not have the quality of evidence; that the employer's evidence was "substantial" in the sense of being sufficient to support the finding; that upon that evidence coming in, the presumption disappeared from the case.

In the *McGill case*, the presumption by statute (No. 13 Public Laws, 1929, Chap. 120, 218 N. C. 589, bottom) placed on the employing municipality "the burden of proof" of suicide, not merely the burden of producing evidence sufficient to support a finding. It must *overcome* the presumption by evidence of greater weight. It "offered no evidence, either direct or by cross-examination, tending to establish a motive for suicide." (218 N. C., mid. p. 588.) The Industrial Commission found accidental death, and the North Carolina Supreme Court affirmed, on the ground that under the North Carolina Workmen's Compensation Law, the statutory presumption supported the Commission's finding. The statute, by shifting the burden of proof, necessarily gave the presumption the quality of evidence, as in *N. Y. Life Ins. Co.* vs. *Gamer,* last trial and appeal, 106 Fed. 2d, 375.

We are not dealing here with a presumption created by statute which places the burden of proof of suicide by preponderance of the evidence on the employer. We are dealing only with the common law presumption, not affected by any statute. The *McGill case* is in a different field of law, purely statutory. It was decided June 16, 1939, before this case was

tried, and petitioner has never before cited it, and now cites the dissenting opinion.

And, furthermore, the case at bar has been tried on the issue, not of accident vs. suicide, a self-inflicted wound being admitted; but of *murder* vs. suicide. It has been implicit in the case that if Dr. Gorham died of a self-inflicted wound, it was suicide; that if the wound were inflicted by another, it was accident. The position of the wound, behind the right ear, excluded any notion of unintentional shooting. It was intentional, whether done by the insured or by an assassin. Plaintiff's whole effort in the trial was the bootless attempt to bring out some evidence of opportunity and motive for assassination (robbery was suggested by counsel) and tending to show that the wound was not self-inflicted. The case was tried on the theory laid down in the pleadings, to-wit: that the plaintiff had the burden of showing that the pistol was fired by somebody else who had a motive and an opportunity to attack Dr. Gorham.

Gorham vs. *Pacific Mutual Life Ins. Co.*, 214 N. C. 526, rehearing 215 N. C. 195, is the last remaining case cited by petitioner. It was urged by petitioner in the District Court and Circuit Court of Appeals as determinative of this question. Petitioner seemed to regard it as almost, if not quite, "the law of the case." Both courts below held otherwise (opinion, p. 4, R. 222) on the ground that neither this question of law, nor the sufficiency of all the evidence as to accidental death, was passed upon in that case, and further, that *this respondent was not a party to that case,* and could not be bound by any concession made by the defendant therein. Yet, petitioner, on p. 24 of her supporting brief, point ("3"), argues that *this defendant* is bound by *"its admission"* in that case. Such a flagrant departure from the fact must, surely, have been inadvertent. And furthermore this respondent takes exception to the quotation in petitioner's supporting brief taken from the *Brief of Pacific Mutual* in *that* case.

That was a case brought by petitioner against another insurance company, The Pacific Mutual Life Ins. Co., on another policy. On the trial, at *close of plaintiff's evidence,* on motion to nonsuit, the trial judge quoted Justice Butler in *N. Y. Life Ins. Co.* vs. *Gamer,* 303 U. S. 161, 171, from memory, to the effect that "the fact of violent death, *without more,* creates a presumption . . . and if it does, and that inference or that presumption is not rebutted by the plaintiff's

evidence, it would appear it is a case for the jury." (215 N. C. 195, 197.) The counsel for that insurance company agreed upon that statement of law at that stage of the case. After defendant's evidence, the trial judge nonsuited the case, on all grounds, coverage and want of notice and proof of loss. On appeal the North Carolina Supreme Court held that defendant in that case had *conceded* the case to the jury on the issue of suicide, and refused to review the evidence on that question (214 N. C. 526, 530–531). It ordered a new trial on the single point decided, to-wit: that the opinion evidence of mental incapacity had probative force on the issue as to excuse for not giving notice and filing proof of loss. (214 N. C. 526, 532.) Fearing the "law of the case" doctrine with respect to the "concession" which the court held had been made, that defendant filed a petition to rehear. Upon rehearing (215 N. C. 195) the former decision was adhered to, but the court definitely relieved that defendant of the "law of the case" handicap in the new trial. At page 199, the court said: "There was no fictive or suppositions establishment of 'the law of the case' on the issue of coverage." So the question of homicide vs. suicide was left wide open for another trial.

Petitioner urges that the counsel for Pacific Mutual in that case are counsel for Mutual Benefit in this case, and that this respondent should be held bound by the concession made by said counsel in the other case. But this respondent has other counsel as well, who are not responsible for what occurred in that case. Besides, as the Circuit Court of Appeals held (opinion, p. 4, R. 222), "this is a separate case, the parties are not bound by concessions made upon the trial in the State Court, which were made solely with reference to that case."

After having examined every North Carolina case which petitioner relied upon for the law of North Carolina, and found them not in conflict with the decision below, the Circuit Court of Appeals then, properly but unnecessarily, stated that in any event the matter of direction of verdict under Rule 50 was a matter which is governed by Federal practice, it going to the very essence of the exercise of the judicial function by the Federal Courts. The statement is in accord with reason and is supported by the decisions of the Supreme Court of the United States cited in the opinion and it is respectfully suggested that this rule is necessary to preserve the integrity of the system of uniform rules prescribed for the U. S. Dis-

trict Courts. Since 1934, nine states have given the rule-making power to their Supreme Courts, the long-range objective being uniformity of rules in all courts, patterned after Federal procedure. But it is insisted by respondent here that that question is not involved on this petition. When that statement was made by the Circuit Court of Appeals the case had already been decided under the same rules which are applied by the Supreme Court of North Carolina. The additional remarks, which respondent considers a sound statement of law, were not the ground of decision in this case and should not be reviewed in this case. The Supreme Court of the United States does not explore by-paths looking for questions to review. It is suggested that if the Circuit Court of Appeals of Fourth Circuit were in error on statement here referred to, then a state rule or statute which forbids a judge to comment at all on the evidence, would be binding on the Federal Courts in such state. This court has already decided that such interference with the functions of the Federal Courts is unconstitutional. *Capitol Traction Co.* vs. *Hof,* 174 U. S., p. 1.

Petitioner has not demonstrated a "probability" of error as to the law which was applied. The only member of the Supreme Court of North Carolina who has expressed himself on the issue of homicide versus suicide is Associate Justice W. A. Devin. In his separate opinion in *Gorham* vs. *Pacific Mutual Life Insurance,* 214 N. C. 526, he dissented from the majority with respect to the plaintiff's excuse for not filing notice, etc., but he concurred with the majority in holding that that defendant (not this one) had *conceded* the case to the jury on the suicide issue. In the *concurring* part of his opinion he said (top p. 536): "A careful examination of all the evidence adduced at the trial leads me to the conclusion that there was no other reasonable hypothesis upon which to account for the death of the insured, but that it resulted from a wound self-inflicted. * * * To my mind it is a manifest case of suicide, which the courts and everybody else should face, notwithstanding technical rules of legal procedure."

THE FACTS.

There can be no question, from the pleadings, the evidence, or the argument that the petitioner had to show a *homicide* in order to recover. Indeed, the position of the wound,

slightly behind and above the opening of the right ear (insured was right-handed, R. 169), ranging forward to a point above the left eye, eliminates the possibility that insured accidentally shot himself. Besides the absence of any evidence that he was handling the gun for any innocent purpose, such as cleaning it, the wound could not possibly have been inflicted by the insured himself except intentionally. Recognizing this fact the complaint alleges homicide as the cause of death; the argument, and even the petition here, go upon this theory.

Petitioner, therefore, had to show either (1) that the shot was fired from a distance, not contact or near contact, a distant shot being impossible for the insured himself, or (2) if it was a contact shot, that some one other than insured placed the pistol to his head at contact and fired it. On the second point, the burden would at least require evidence that some one else had a motive and an opportunity to shoot. This being unlikely, if not impossible, under the evidence, petitioner devoted most of her effort toward showing some evidence to put her to the jury on her contention that the shot was a distant one.

Only an autopsy could settle that question, so she had one made fourteen months after the death on March 9, 1933, to-wit, on July 28, 1934, without notice to respondent of her intention, or even of her claim. She selected Dr. W. D. Forbus, head of the Department of Pathology of Duke University, and bound him to secrecy. He made his report to her, and delivered to her at her request the bullet, the entire brain and the calvarium (R. 146–149). She took these articles to Washington, D. C., and consulted ballistic experts (R. p. 191), but did not produce any to testify. She then placed the articles in her bank vault (R. 192) and nobody else has seen them since.

After she sued the Pacific Mutual that company took Dr. Forbus' deposition (R. 146). Petitioner was present and objected to his testifying (R. 136). He was called as a witness by this respondent in this case, and testified to his findings, which included conditions observed on the exterior of the wound (which might possibly have been modified by preparation for burial and by some decomposition), and also conditions on the interior of the brain and skull, which could not possibly have been modified by decomposition, as the body was in a sufficient state of preservation for a satisfactory post mortem (R. 137). Some of the conditions observed on the

exterior were consistent either with a distant or contact or near-contact shot, but none was inconsistent with such a shot. The conditions on the interior were absolutely impossible except in case of a contact or near-contact shot. Of these the most convincing and important were:

(1) "The skull was so extensively fractured in many places that it was easy to remove it from the neck, merely by lifting it off, without any extensive sawing operations, which is usually required for that purpose." (R. 139.) He explained that the fractures were due to the explosion of the gases within the skull, and that the gases could not have entered the skull unless the shot was from contact or near-contact. (R. 144.)

(2) "Were the tissues inside Dr. Gorham's head charred or burned by the flame? Yes, sir." (R. 145.) He explained that this would not have been found in case of a distant shot.

(3) The bullet made a *straight line* of injury to the brain from where it started to where it lodged (R. 139) and the "microscopic studies and the chemical determination which I made showed that partially burned unconsumed powder was situated at a point just beneath the position at which I found the bullet on the left side of the brain, and in addition all along the course of travel of the bullet from the point of entry to the point of attempted exit." (R. 140.) He explained that only a contact or near-contact shot could possibly have carried into the interior the powder residue which he found, in both hemispheres of the brain.

Petitioner sought to shake this testimony on cross-examination, and in her petition here claims that Dr. Forbus admitted he was uncertain of this finding. This claim is a complete distortion of the cross-examination, which was as follows (R. 154–155): "Q. Did you make a microscopic examination of this substance, whatever it was, that you removed from the wound? Ans. Yes, I did. . . . Q. Even then you could not be absolutely certain what it was? Ans. Not absolutely certain. *There were other tests.* Q. You made other tests of that? Ans. I did. Q. What other tests did you make? Ans. I made certain chemical tests. Q. What chemical tests did you make? Ans. For the identification of unexploded powder. . . . I found as a result of these tests that the material which I removed from the point where the bullet lodged acted chemically like the material which one has left on a

piece of glass when one ignites black powder." (The powder in the other four unexploded cartridges left in the gun was "in the black class.") (R. 178–179.)

On this evidence, and much additional, the District Court and Circuit Court of Appeals held that the shot was from contact or near-contact and they further held that there was "no substantial contradiction" (In re: *Johnson,* 182 N. C. 522, 525 middle) of it in the case. That was the basis of the directed verdict.

The petitioner contends there is substantial contradiction. For that she relies upon the testimony of Dr. C. C. Carpenter, an expert witness called by her when Dr. Forbus' evidence was not to her liking. She selected both the pathologists who testified in this case. He testified without ever having seen the body, *or any part of it.* He testified that "obviously the best material I could have had would be the actual material in question," and that he "suggested that it be put at his disposal, and it was not put at his disposal." (R. 200, 201.) Mrs. Gorham did not testify at the trial, and has never explained why she did not grant Dr. Carpenter's request. Yet, the essential materials, the skull and brain, were in her possession in her bank vault. (R. 147; R. 191; R. 192; R. 146; R. 147.) Deprived of essential materials upon which to form a conclusion, Dr. Carpenter contented himself with criticizing Dr. Forbus' technique, and he attempted to question the findings of Dr. Forbus, purely upon the testimony of Dr. Forbus in this case (all of which he did not hear, R. 97), and in another case in another court against another company, not introduced in this case. He attempted to tell the jury how much weight they should give to Dr. Forbus' testimony. The Circuit Court's characterization of his testimony as "entirely hypothetical and devoid of probative value" is not only warranted by the facts and by precedent (*U. S.* vs. *Thornburg,* 111 Fed. 2d, 278, a similar situation) but also because what he said made no substantial contradiction of Dr. Forbus, and, in fact, corroborated the latter.

He said Dr. Forbus was a good pathologist (R. 201); that if Dr. Forbus found unignited powder carried into the wound and into the remote portion of the brain, it was his opinion that the revolver was fired at contact or near-contact (R. 201, 202). He said if the wound was seared and burned inside the orifice, the shot was contact or near-contact (R. 202). Dr. Forbus found the "charring or burning by the flame" in-

side the head. (R. 145.) The fantastic performance of Dr. Carpenter can be best illustrated by his position with respect to the finding of unexploded powder in the brain. He could not, of course, deny the finding, but he "argued" to the jury that the gritty material "might *possibly* be the result of decomposition of *brain tissue!*" If this is not pure "conjecture," or "speculation," or "guess," what is it? And this on behalf of the party who had the burden of proof.

Petitioner argues that since Dr. Forbus found no external branding, and no powder tatooing, that "invariably" indicates a distant shot. But these findings are equally consistent with a direct contact shot. (R. 145.) It is fire at short range, but not contact, which produces them.

Petitioner thinks important "the unusual location of the wound"—back of right ear instead of a frontal wound. And she contends it would have been "impossible" for insured to have fired the pistol there at the angle found. The location was the same as in the suicide case of *Sawyer* vs. *Mutual Benefit Health & Accident Assoc.*, 121 Neb. 504. And Dr. Carpenter was required to demonstrate his thesis that if Dr. Gorham had fired the pistol at contact the bullet would have come out *behind* the left ear. The result: The demonstration showed that absolute contact would bring the bullet out, *not behind the left ear but in front of it.* (R. 96.) Dr. Forbus demonstrated that the pistol could have been fired from that angle (R. 156), and it is common knowledge.

A fuller summary of the evidence on the issue of a distant shot versus a contact shot will be found in Appendix I, this brief, pp. 23–30, and pp. 40–41.

Since the shot was from contact or near-contact, on the uncontradicted findings of the post-mortem examiner, and according to the opinion, on the essential findings, of both pathologists, petitioner's and respondent's, it was necessary for petitioner to show that someone other than insured had a motive and opportunity to get possession of insured's own pistol and put it against his head, and shoot him while standing directly over him as he, insured, was working at his desk, without creating any disturbance. The uncontradicted evidence was that the doctor was seated at his desk, his back to a blank wall, facing both the doors into the office. It was on the second floor of a brick building located on a plaza, no other buildings anywhere near. All outside windows were closed, and no bullet hole in any of them. The intruder

would have had to walk in the office in full view of insured, and walk around behind him and approach him from the rear. (A map was before the Circuit Court of Appeals showing all of this, and see R. 115–118, incl.) Nothing in the office was disturbed. The scene was peaceful and quiet. The safe was open as usual (it was never locked, R. 169) and the only thing out of place was the drawer to the lock-compartment sitting on top of the small safe. In this insured may have kept his pistol, or his income tax records, but there is absolutely *no evidence* as to whether he kept anything in it, or if so, what. His secretary for five years said the safe was always unlocked except for this compartment; that the doctor never put any money in it. (R. 169.) And the suggestion of robbery as a motive, never more than a suggestion of counsel, completely disappears from the case in the face of the fact that the undertaker found the doctor's watch and money untouched in his pockets and turned them over to insured's brother. (R. 114.) There was never even a suggestion that anyone ever had any ill-will toward Dr. Gorham. According to standards customarily applied, *Frankel* vs. *N. Y. Life Ins. Co.,* 51 Fed. 2nd, 933; *N. Y. Life* vs. *Stone,* 80 Fed. 2d, 614, petitioner signally failed to carry the burden of showing opportunity or motive for assassination.

The pistol belonged to the insured, according to petitioner's own statements made at widely separated times and places, on the day of the death and a year later to Dr. J. R. Norton, then Health Officer, now Professor of Public Health, University of North Carolina (R. 158); to Mrs. Ward, her husband's secretary (R. 170–171); to Police Officer P. C. Zimmerman (R. 181). She said he had owned it for years, that she herself had shot it at home out of the back window; that she didn't know he had carried it to the office. She was in court during the trial, but did not take the stand to deny any of these statements.

The finger-print on the pistol was too smeared to identify, but there was only one print. (R. 74.) This is usual in self-injury cases. It was so in *Del Vecchio* vs. *Bowers,* 296 U. S. 280, 282, where "there were no identifiable finger-prints upon the weapon, but an indistinct print of the side of a finger was discernible." In that case a self-inflicted frontal wound was agreed upon by both sides, and the issue was whether it was accidental or intentional. It was so in the

case of the suicide witness in the *James J. Hines case* in New York. The slipping of the weapon smears the print. This is common knowledge.

The spattering of the eye-glasses with blood was perfectly natural. The insured's forehead rested on the edge of the desk, his glasses were slightly disarranged (R. 123; R. 157), and immediately in contact with or just below the ledge of the desk. Every witness said the blood ran down across the back of the doctor's head and dripped on the desk and thence to the floor. The glasses were in the way in its downward course (R. 130) and got spattered.

Most witnesses placed insured's right hand hanging down between his legs, but one didn't remember (R. 11) and the coroner, after six years, recollected it as hanging down outside the right leg. But he (R. 130), like all the others, said "the pistol was immediately under the hand." There is complete agreement on this illuminating fact that is helpful in ascertaining the truth.

SIDE ISSUE FACTS.

The burden was not on respondent to show suicide. But to find suicide, proof of motive was not required. *Love* vs. *N. Y. Life Ins. Co.,* 64 Fed. 2nd, 829. And insured's favorable domestic or financial situation is not inconsistent with suicide. *Burkett* vs. *N. Y. Life Ins. Co.,* 56 Fed. 2nd, 105. While proof concerning these matters is admissible and often helpful, nevertheless if suicide appears from the contact shot, located as here, and from the want of evidence of shooting by any one else but insured, evidence pro and con on these matters does not raise an issue on any vital question. But there is here no substantial contradiction of the following facts:

Dr. Gorham was a sweet-tempered, quiet, reserved gentleman, never talking "out of school," and never had an altercation with any one in his life. He was a church-member, loyal to his family, etc.

Whether justified or not, he was terribly worried over his finances and his wife's health. (R. 167.) He cut his secretary's salary and wrote his former partner he didn't need her at all (R. 213) and that his house was advertised for taxes for the first time in his life. (R. 212.) He told Mrs. Williams, a patient, the same thing the day before he died. (R. 166.) The day before his death, a patient of thirty years

standing dropped in for a small adjustment of a plate. He owed $3.00 for work done the week before. (R. 58.) While in the dental chair, insured asked him to pay that bill, and a tension was created. (R. 170.) The last thing he said to his secretary the night he died was, "Mrs. Ward, I don't know what is going to happen. We may have to close shop." (R. 170.) Not long before his death he told a neighbor he was worried about collections, in the presence of his wife, petitioner, and she said "Yes, we are having to live off the rent we get from my rooms," to which Dr. Gorham made no reply. (R. 187.)

Insured made his will on February 9, 1933, 28 days before he died. (R. 174.)

Two-thirds of his estate was life insurance payable to his estate, in addition to $2,500.00 to his wife. (R. 174.)

Petitioner qualified in the probate court as co-executor, and with the other executor filed proofs of death and collected all the life insurance on a statement that the cause of death was suicide. (R. 207–212, incl.) She also collected her own $2,500.00 on a similar statement.

If there were any contradiction as to the "side issue" facts, that could not effect the result. If they had not been established, the post-mortem examination, and the absence of evidence of homicide, would leave only one inference to be drawn by reasonable men, to-wit, suicide. That inference would be drawn, and the case taken from the jury, in the North Carolina Supreme Court, if it followed its own decisions, notably *Spruill* vs. *Ins. Co.*, 120 N. C. 141, and *Warren* vs. *Ins. Co.*, 217 N. C. 705. Since the Circuit Court of Appeals applied the State law properly, and as it was conceded to be by the petitioner, there is no reason to review its decision.

B. THE CIRCUIT COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF LAW IN CONFLICT WITH DECISIONS IN OTHER CIRCUIT COURTS OF APPEAL.

There can be no conflict of decision between different Circuit Courts of Appeal on a question of State law in North Carolina. There could only be a conflict between such Circuit Court and the Supreme Court of North Carolina. We have shown that none such exists in this case.

As to questions controlled by State law, conflict among circuits is not of itself a reason for granting a writ of certiorari.

Ruhlin vs. *N. Y. Life Ins. Co.*, 304 U. S. 202.

C. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

The two cases cited by petitioner (*N. Y. Life* vs. *Gamer*, 303 U. S. 161; *Del Vecchio* vs. *Bowers*, 296 U. S. 280) are in accord. But under Rule 38, a conflict would be ground for review only if it involved a Federal question, which this case does not. It is a case of State law.

D. NEITHER THE DISTRICT COURT, NOR THE CIRCUIT COURT OF APPEALS, DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioner cites no authority except the Constitutions of the United States and the State of North Carolina. She complains that the judge answered the issues himself.

The case has been tried according to the substantive law of North Carolina, as conceded by petitioner and established by decisions, and under the Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States, pursuant to the Act of June 19, 1934, Ch. 651. The case ended by a verdict directed under Rule 50. Under both State and Federal rules, only one inference was permissible upon all the evidence, assuming all the *evidence* of petitioner to be true, and drawing all reasonable inferences therefrom in her favor. If the case had gone to the jury, with verdict for the petitioner, the District Judge would have set it aside as often as rendered. The accepted practice in Federal Courts is that when the judge takes a case from the jury, he answers the issues himself. The North Carolina Court also takes the case from the jury when the burden is on the plaintiff, and case is dismissed upon nonsuit or directed verdict. *McIntosh*, N. C. Practice and Procedure, p. 632. When the burden is on defendant, and a peremptory instruction is given for defendant, the judge submits

the issue to the jury with the instruction, and usually writes the answer himself upon a showing of hands. The plaintiff could never have a verdict in such a case. *Warren* vs. *Ins. Co.*, 217 N. C. 705.

Secondly, the granting of review, or even the reversal of the judgment of the Circuit Court of Appeals, on the single issue decided therein, would not avail the petitioner in the vindication of her private rights. For the verdict was directed against her in the District Court on four independent grounds, any one of which bars her recovery. True, only one of them, the failure to prove death by accidental means, was the basis of affirmance in the Circuit Court, but the other three stand undisturbed by that court. If any one of them is sound, why prolong the litigation? In case of reversal, the case would be remanded to the Circuit Court of Appeals with directions to pass on those questions of State law. *West* vs. *Am. Tel. & Tel. Co.*, ____ U. S. ____, 85 L. ed. 146, 152 (Adv. op.). Since the petitioner argues that these positions are unsound, the respondent briefly explains them here and now.

A. *The action was not seasonably brought.* The petitioner brought her suit the first time a few days within the two years allowed by the policy. The action was dismissed as of nonsuit. This action was brought more than two years after loss occurred, more than six months after the nonsuit, and a few days within one year after the nonsuit. A *statute of limitations* may be avoided by bringing suit seasonably, and if nonsuited, bringing another suit within one year. C. S. 415, Appendix I, page 5. But another statute forbids any insurance company from stipulating a shorter time for bringing suit than one year, or "to less than six months from" any nonsuit of an action begun within the legal time. C. S. 6290, Appendix I, p. 5. The North Carolina Supreme Court has held that the policy stipulation is contractual, and not a statute of limitations (*Rouse* vs. *Old Colony Ins. Co.*, 203 N. C. 345; *Welch* vs. *Ins. Co.*, 192 N. C. 809); that therefore it is not within the terms of C. S. 407, protecting minors, insane persons, and prisoners from the statutes of limitations (*Beard* vs. *Sovereign Lodge*, 184 N. C. 154; *Holly* vs. *London Assurance Society*, 170 N. C. 4; *Heileg* vs. *Ins. Co.*, 152 N. C. 358, accident policy); that the insurance statute, C. S. 6290, *is read into every policy which* prescribes a shorter time (*Modlin* vs. *Ins. Co.*, 151 N. C. 35, 45, and see *Eckard* vs.

Ins. Co., 210 N. C. 130); that a suit brought beyond the time stipulated in the policy, if that time is as long as one year, even by a minor, lunatic, or prisoner, is brought too late (*Beard, Holly,* and *Heileg cases, supra*); that a suit brought beyond said stipulated time, although within one year after nonsuit of an action brought in apt time, was brought too late (as C. S. 6290 then stood, with no provision for new suit after nonsuit) (*Muse* vs. *Ins. Co.,* 108 N. C. 240); and finally, after the March 4, 1901, amendment inserted in C. S. 6290 a lee-way of six months after nonsuit, the court held that a suit brought beyond the stipulated time, but *within six months* after nonsuit of an action seasonably brought, was brought in time, for the reason that since the *Muse case "the law has been changed by the Legislature,"* and further held that the finding that "this suit was brought within six months after the nonsuit" was necessary to sustain the lower court's ruling (*Parker* vs. *Ins. Co.,* 143 N. C. 339).

To combat this long and consistent line of cases construing North Carolina statutes, C. S. 415 and C. S. 6290, petitioner cites one lone case, *Carolina Transportation & Distributing Co.* vs. *Insurance Co.,* 214 N. C. 596. The issue in that case made by the briefs was whether the new suit was the same suit, and defendant conceded (brief, p. 9) "that a plaintiff has the right to reinstitute a suit with the exception hereafter mentioned, within one year after nonsuit." Neither of the briefs (they are filed with the Clerk of this Court), nor the opinion, cites the applicable statute, C. S. 6290, or any one of the long line of cases construing it. The case holds that the two suits were the same, and that, as conceded by the parties, C. S. 415, permitted a new suit in one year. This case is not a decision which changes the law of North Carolina. On this point, it is not even a precedent in North Carolina. The question only lurked in the record. In *Dunn* vs. *Swanson,* 217 N. C. 279, the court held that a decision on the liability of a sheriff's bond, when the applicable statute was not brought to court's attention, is not binding on the court in a later case, in which the controlling statute was cited. See, also, *N. Y. Life Ins. Co.* vs. *Gamer,* 106 Fed. 2nd, 375, and *Webster* vs. *Fall,* 266 U. S. 507, 511. The Federal Courts recognize a rule of State law established by a clear line of decision in the state, "until it clearly appears that it has been overruled by the court of last resort." *Mangol* vs. *Metro-*

politan Life Ins. Co. (C. C. A. Ill. 1939), 103 Fed. 2nd, 14. Here neither the cases which petitioner claims to be overruled, nor the statute construed in them, nor the principle they established, were even mentioned by court or counsel. Nor is the Federal Court bound by mere dictum of the State Court. *Six Companies* vs. *Joint Highway Dist.*, ____ U. S. ____, 85 L. ed. 159 (Adv. op.). There is every reason to believe that the North Carolina Supreme Court will continue to construe C. S. 6290 as heretofore, and disregard the case petitioner relies upon as the result of inadvertence. This question has been decided for respondent by the District Court, but was deemed unnecessary to decide by the Circuit Court of Appeals.

The argument here summarized is set forth more fully with statutes quoted verbatim, and their history traced, in Appendix I, pp. 4–19.

B. *The petitioner did not comply with policy conditions as to notice and proof of loss, although alleging that she did.* Suit was brought in her own name, without ever giving any notice of death by accidental means. Insured died March 9, 1933, and on Sept. 5, 1934, petitioner's lawyer advised the company "of the death of Dr. Gorham" (R. 6). That was all. On the trial, petitioner relied upon opinion evidence of mental incapacity to give notice or file proofs, from one physician, her daughter, and two other laymen. (Appendix I, p. 46.) Respondent countered with opinion evidence of fourteen witnesses to the contrary, and evidence of her careful and shrewed preparations for this lawsuit for over a year before Sept. 5, 1934, having autopsy made (under contract with Dr. W. D. Forbus, head of Department of Pathology, Duke University, by which he was bound to divulge results to no one but her); consulting ballistic experts, etc. (Appendix I, pp. 46–48.) The evidence of petitioner was about the same as, but the evidence of the respondent was stronger (by reason of the significant contract with Dr. Forbus), than that offered in another case, *Gorham* vs. *Pacific Mutual Life Insurance Company*, 214 N. C. 526, rehearing 215 N. C. 195, in which the North Carolina Supreme Court held (214 N. C. 532, middle) that the opinion evidence of petitioner had probative force, and that the issue of excuse from filing notice and proof should have been submitted to the jury. This is the

only point decided by that case. The court had previously established, by a line of decisions (*Harrison* vs. *R. R.*, 194 N. C. 656; *Thigpen* vs. *Ins. Co.*, 204 N. C. 551; *Hill* vs. *Ins. Co.*, 207 N. C. 166; *Carter* vs. *Ins. Co.*, 208 N. C. 665; *Lee* vs. *Assurance Society*, 211 N. C. 182, cf. *Hare* vs. *Weil*, 213 N. C. 484), the rule that opinion evidence of mental incapacity, in the face of uncontradicted evidence of the performance of acts by the subject which he could not have performed had the opinion been warranted, is a mere assertion or expression of arbitrary opinion of no probative value. That is also the rule in the Federal Courts. (*Ocean Accident & Guaranty Co.* vs. *Moore*, 85 Fed. 2nd, 367, 375 *U. S.* vs. *Thornburgh*, 111 Fed. 2nd, 278). If a decision as to the probative value of such opinion evidence is a decision on substantive law, the Federal Courts would be bound by it in this case, if the evidence were the same, under the rule of the *Erie case*. *Stoner* vs. *N. Y. Life Ins. Co.*, ____ U. S. ____, 85 L. ed. 275 (Adv. op.). But if such a decision is merely procedural, it would be otherwise. This question was passed over by the Circuit Court of Appeals, as unnecessary for decision, in view of the court's opinion that suicide was self-evident from the evidence in the case. We can find no authority on the question whether a ruling as to the *probative value* of an opinion is distinguished from the ruling in the *Stoner case*, "that petitioner's *evidence* presented a case for the jury." But we respectfully submit that there is such a distinction. It is substantive law, that a certain state of *facts* makes a case for the jury. But facts must appear from *evidence*. And surely it is procedural, when a court rules that a statement made by a witness is so absurd, so opposed to facts of common knowledge, that the court will not accept it, as the District Court here ruled. A court cannot function through mental operations which are borrowed from an alien mind. This would present an interesting question if presented on this record. But it cannot reach this court until it shall have been decided by the Circuit Court of Appeals.

The respondent's argument on this question, with statement of facts, will be found in Appendix I, pp. 43–57.

C. *The petitioner violated the autopsy clause*, granting to respondent "the right and opportunity to make an autopsy in case of death" (Standard Provision No. 8). This she did

by withholding notice to the company until long after she had had the autopsy performed secretly, bound the physician to keep his findings secret, taken from the body all the essential parts, to-wit, the calvarium, and the entire brain, locked them up in a bank vault, and brought suit on February 25, 1935. The complaint was the first notice of claim of death by accidental means. The only previous notice had been September 5, 1934, of "the *death* of Dr. Gorham." The autopsy had been performed in July, 1934. The demand for disclosure of the findings was made before time for answer expired, and refused. Petitioner had in her possession the findings, and the only material from which findings could be made. She refused to inform the company when the company needed the information to decide whether and on what ground to file answer.

There is no decision in North Carolina on this question. So respondent relies on the law as generally laid down in other jurisdictions. *McCulloch* vs. *Mutual Life Ins. Co.* (C. C. A. 4th), 109 Fed. 2nd, 866, and other cases cited in Appendix I, pp. 62–69, where the policy provision, statute, pleadings, and evidence are set forth. This is a question of State law which was not passed upon in the Circuit Court of Appeals, but which remains as a hurdle for the petitioner to get over.

It is more than likely that if this case is remanded to the Circuit Court, the result would be the same, affirmance of the District Court on one or more of these grounds not decided in the opinion of the Circuit Court of Appeals.

CONCLUSION.

Dr. Gorham died March 9, 1933. Petitioner began this litigation February 25, 1935. She was nonsuited April 13, 1937, and began this new action on April 8, 1938. The District Court decided against her on all four defenses. The Circuit Court of Appeals decided against her on one of them, not passing upon the other three. She petitioned for rehearing. Rehearing denied. Now this petition. If review is granted, and a reversal ordered on that one point, the Circuit Court of Appeals would have to again hear the case. If still adverse to petitioner, then there would be other petitions

for certiorari to this court. The case has been decided in accord with the conclusion which would be inevitably reached by any candid mind, and the litigation should not be prolonged.

Respectfully submitted,

JULIUS C. SMITH,
C. R. WHARTON,
Greensboro, N. C.

KEMP D. BATTLE,
FRANCIS E. WINSLOW,
Rocky Mount, N. C.
Counsel for Respondent.